No. 17-1606

# In the Supreme Court of the United States

RICKY LEE SMITH, PETITIONER

*v.*

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE RESPONDENT SUPPORTING REVERSAL AND REMAND


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## QUESTION PRESENTED

The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide various monetary benefits to certain eligible individuals. The Act directs the Commissioner of Social Security to adjudicate applications for benefits, and it authorizes judicial review of "any final decision of the Commissioner of Social Security made after a hearing to which [the claimant] was a party." 42 U.S.C. 405(g); see 42 U.S.C. 1383(c)(3). Petitioner filed an application for supplemental-security-income benefits under Title XVI of the Act, 42 U.S.C. 1381 *et seq.*, and an administrative law judge (ALJ) denied petitioner's claim after a hearing. Petitioner filed a request for review of the ALJ's decision with SSA's Appeals Council. The Appeals Council dismissed petitioner's request for review, finding that it was untimely under an SSA regulation and that petitioner had not shown good cause for missing the deadline. See 20 C.F.R. 416.1468. SSA's regulations provide that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review," 20 C.F.R. 416.1472, and that in such circumstances the ALJ's decision "is binding on all parties," 20 C.F.R. 416.1455. The question presented is:

Whether a decision of the Appeals Council dismissing as untimely a request for review of a decision issued by an ALJ after a hearing is a "final decision of the Commissioner of Social Security made after a hearing" that is subject to judicial review under 42 U.S.C. 405(g).

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## BRIEF FOR THE RESPONDENT SUPPORTING REVERSAL AND REMAND

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 813. The orders of the district court granting respondent's motion to dismiss (Pet. App. 22a-26a) and denying petitioner's subsequent motion for relief under Federal Rule of Civil Procedure 59(e) (Pet. App. 16a-21a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on January 26, 2018. On April 19, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 25, 2018, and the petition was filed on that date. The petition for a writ of certiorari was granted on November 2, 2018. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-24a.

## STATEMENT

### A. Statutory And Regulatory Background

1. *Statutory framework.* The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide monetary benefits to certain eligible individuals under Titles II and XVI of the Act. Title II, 42 U.S.C. 401 *et seq.*, establishes an "insurance program" that "provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need." *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). Title XVI, 42 U.S.C. 1381 *et seq.*, establishes a separate social "welfare program" that provides supplemental-security-income benefits "to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Galbreath*, 485 U.S. at 75.

When benefits are sought under either program, the Act "direct[s]" the Commissioner of Social Security "to make findings of fact, and decisions as to the right of any individual applying for a payment." 42 U.S.C. 405(b)(1); see 42 U.S.C. 1383(c)(1)(A). The Act establishes certain minimum requirements that the Commissioner must observe in adjudicating applications for benefits. For example, in cases involving an application for disability benefits, if the Commissioner renders a decision adverse to the claimant on the question of disability, the decision must contain a statement of the case, in understandable language, setting forth a discussion of the evidence and stating the Commissioner's

determination and the reasons upon which it is based. See *ibid.* The Commissioner must also provide the claimant notice and an opportunity for a hearing to review an adverse decision. See *ibid.*

The Act provides that a final decision of the agency made after a hearing is subject to judicial review. 42 U.S.C. 405(g). Specifically, Section 405(g) provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action" in federal district court "commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow." *Ibid.* (Title II proceedings); see 42 U.S.C. 1383(c)(3) (The Commissioner's "final determination[s]" regarding supplemental-security-income benefits under Title XVI shall be "subject to judicial review as provided in section 405(g) of [Title 42] to the same extent as the Commissioner's final determinations under section 405."). That provision for judicial review is exclusive: "The findings and decision of the Commissioner of Social Security after a hearing" are "binding upon all individuals who were parties to such hearing" and may not be reviewed except as provided in the Act. 42 U.S.C. 405(h). The Act also provides that, in the course of judicial review, "[t]he findings of the Commissioner * * * as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. 405(g).

Subject to those and other requirements established by the Act itself, the Act grants SSA broad discretion to shape administrative procedures for adjudicating benefits applications under Titles II and XVI. The Act au-

thorizes the Commissioner "to make rules and regulations and to establish procedures, not inconsistent with the provisions of [Titles II and XVI of the Act], which are necessary or appropriate to carry out" the Act's provisions. 42 U.S.C. 405(a); see 42 U.S.C. 1383(d)(1). The Commissioner is "further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper." 42 U.S.C. 405(b)(1), 1383(c)(1)(A). In cases in which the Commissioner, after a hearing, renders a decision adverse to the claimant "because of failure of the claimant * * * to submit proof in conformity with any regulation prescribed under" Section 405(a), the Act limits a district court's review to "only the question of conformity with such regulations and the validity of such regulations." 42 U.S.C. 405(g).

2. *SSA administrative-review process.* Exercising the authority conferred by Section 405(a), the Commissioner has established a multi-step administrative process through which SSA adjudicates claims for benefits. See 20 C.F.R. 416.1400.[1] The claims process begins with an "initial determination," which may be followed by "reconsideration," a hearing before an administrative

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[1] Because this case involves supplemental-security-income benefits under Title XVI, this brief cites the regulatory provisions applicable to Title XVI cases. Parallel provisions exist for Title II benefits. See generally 20 C.F.R. 404.900 *et seq.* See also *Sims* v. *Apfel*, 530 U.S. 103, 107 n.2 (2000) (noting that the regulations governing Titles II and XVI are "not materially different"). During the pendency of petitioner's claim for benefits and this litigation, the regulations have been modified in various respects not relevant to the issues presented in this proceeding. For simplicity and consistency, this brief refers to the regulatory provisions currently in force unless indicated otherwise.

law judge (ALJ), and review by the SSA Appeals Council (a body within SSA that reviews ALJ decisions). 20 C.F.R. 416.1400(a)(1)-(4); see *Bowen* v. *City of New York*, 476 U.S. 467, 471-472 (1986). SSA's final decision is then subject to judicial review in federal district court. 20 C.F.R. 416.1400(a)(5); see *City of New York*, 476 U.S. at 472. At each step of the process, SSA's determination or decision generally becomes binding on the claimant unless he timely pursues further review in accordance with SSA's regulations. 20 C.F.R. 416.1400(b) (if a claimant "do[es] not take the next step [in the administrative-review process] within the stated time period," the claimant "will lose [the] right to further administrative review and [the] right to judicial review," unless good cause exists); see *City of New York*, 476 U.S. at 472.

a. *Initial determination and reconsideration.* A person who applies for benefits first receives an initial determination, based on the preponderance of the evidence, that "states[s] the important facts and give[s] the reasons for [SSA's] conclusions." 20 C.F.R. 416.1402; see 20 C.F.R. 416.1400(a)(1), 416.1404(a).

If the claimant is dissatisfied with the initial determination, he can seek reconsideration. 20 C.F.R. 416.1400(a)(2). A request for reconsideration must be submitted in writing within 60 days of the date the claimant receives notice of the initial determination, unless SSA grants a request to extend the time to request reconsideration for good cause. 20 C.F.R. 416.1409; see 20 C.F.R. 416.1411 (considerations relevant to good-cause determination). If the claimant timely requests reconsideration, the agency will conduct further review and render a "reconsidered determination" that "will

give the findings of fact and the reasons for the reconsidered determination." 20 C.F.R. 416.1417(a) and (b); see 20 C.F.R. 416.1413-416.1422. If, on the other hand, the claimant does not timely seek reconsideration, the initial determination becomes binding. 20 C.F.R. 416.1405.

b. *ALJ hearing and decision.* If the claimant is dissatisfied with the reconsidered determination, he may request a hearing before an ALJ. 20 C.F.R. 416.1400(a)(3); see 20 C.F.R. 416.1429-416.1435. A request for a hearing must be submitted in writing within 60 days of receipt of the reconsidered determination, unless SSA grants a request to extend the time to request a hearing for good cause. 20 C.F.R. 416.1433(b) and (c) (cross referencing good-cause factors in 20 C.F.R. 416.1411); see also 42 U.S.C. 405(b)(1), 1383(c)(1)(A) (hearing must be requested within 60 days).

If an ALJ hearing is timely requested, the ALJ will ordinarily conduct a hearing and receive additional submissions. See 20 C.F.R. 416.1436, 416.1446, 416.1449-416.1452; see also 20 C.F.R. 416.1448 (listing circumstances in which oral hearing may be waived). The ALJ will then typically issue a "written decision" based on "the preponderance of the evidence" that "gives the findings of fact and the reasons for the decision." 20 C.F.R. 416.1453(a). Alternatively, an ALJ may issue a recommended decision and transfer the case to the Appeals Council. 20 C.F.R. 416.1453(d).

If a claimant submits an untimely request for an ALJ hearing and does not demonstrate "good cause for missing the deadline," 20 C.F.R. 416.1433(c), the ALJ will

"dismiss" the hearing request. 20 C.F.R. 416.1457(c)(3).[2] If the claimant believes that the ALJ's dismissal of a hearing request was erroneous, the regulations permit the claimant, within 60 days of receipt of notice of the dismissal of the hearing request, to request that an ALJ or the Appeals Council vacate the ALJ's dismissal. 20 C.F.R. 416.1460(a). The ALJ or the Appeals Council also may vacate the dismissal *sua sponte*. *Ibid.* The regulations state that "[t]he dismissal of a request for a hearing is binding, unless it is vacated by an [ALJ] or the Appeals Council." 20 C.F.R. 416.1459. SSA has interpreted this regulation to mean that "an ALJ's order finding no good cause for a late hearing request and dismissing the request as untimely is not subject to judicial review." 81 Fed. Reg. 13,438, 13,439 (Mar. 14, 2016); see also 20 C.F.R. 416.1403(a)(8) (stating that a denial of a request "to extend the time period for requesting review of a determination" is "not subject to the administrative review process" and is "not subject to judicial review").[3] If the claimant does not request an ALJ

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[2] An ALJ may dismiss a hearing request on other grounds as well: if the claimant has withdrawn the hearing request; if the claimant fails to appear at a scheduled hearing without good cause; if the claim is barred by *res judicata* because of a prior final decision on the same claim; if the claimant is not entitled to a hearing; or if the claimant has died with no survivor or other parties to the claim. 20 C.F.R. 416.1457.

[3] SSA has explained that its regulations define the term "decision" to mean the decision of an ALJ or the Appeals Council, 20 C.F.R. 416.1401, and that a "decision" by an ALJ is subject to review by the Appeals Council and ultimately may be subject to judicial review, 20 C.F.R. 416.1455. See 81 Fed. Reg. at 13,439. SSA has further explained that an ALJ's dismissal of a hearing request, on the other hand, is not a "decision" under the regulations; although a dismissal may be vacated by an ALJ or the Appeals Council pursuant to a specific regulation, 20 C.F.R. 416.1460(a), the

hearing, the reconsidered determination becomes binding. See 20 C.F.R. 416.1421; see also 20 C.F.R. 416.1417(d).

c. *Appeals Council review.* If a claimant is dissatisfied with an ALJ's decision on the merits, he may request review by the Appeals Council. 20 C.F.R. 416.1400(a)(4); see 20 C.F.R. 416.1467-416.1481. To do so, the claimant must file a written request for review within 60 days after receiving notice of the ALJ's decision, unless the Appeals Council extends that deadline for good cause. 20 C.F.R. 416.1468 (cross referencing good-cause factors in 20 C.F.R. 416.1411).

If the claimant timely requests review (or the untimely filing is excused), the Appeals Council may then either grant or deny review. 20 C.F.R. 416.1467, 416.1481; see 20 C.F.R. 416.1470 (2014) (setting forth criteria for cases Appeals Council will review); 20 C.F.R. 416.1470 (2018) (similar but establishing additional limitations on circumstances in which Appeals Council will consider new evidence). The Appeals Council may also initiate review on its own motion. 20 C.F.R. 416.1469. If the Appeals Council grants review, it will subsequently either "issue a decision" on the merits of the claim or "remand" the case to an ALJ for further proceedings. 20 C.F.R. 416.1467; see 20 C.F.R. 416.1479. If the Appeals Council issues a decision and the claimant is dissatisfied with the decision, he may then seek judicial review by filing an action in federal district court under 42 U.S.C. 405(g) within 60 days, unless that period is extended for good cause. 20 C.F.R.

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regulations provide that the dismissal is binding unless vacated and is not subject to the regular administrative-review process or to judicial review, 20 C.F.R. 416.1403(a)(8), 416.1459. See 81 Fed. Reg. at 13,439.

416.1400(a)(5), 416.1479-416.1482; see 42 U.S.C. 405(g), 1383(c)(3) (civil action must be commenced within 60 days or within such further time as SSA may allow). If judicial review is not sought, the Appeals Council's decision becomes binding. 20 C.F.R. 416.1481. If the Appeals Council denies review, then the ALJ's decision becomes SSA's final decision, *ibid.*, and the claimant may seek judicial review of that final decision. See 20 C.F.R. 416.1400(a)(5). With exceptions not implicated here, if the Appeals Council denies review and judicial review of the ALJ's decision is not sought, the ALJ's decision becomes binding. 20 C.F.R. 416.1455, 416.1481.

If the claimant seeks Appeals Council review but does not file his request "within the stated period of time and the time for filing has not been extended," SSA's regulations have long provided that the Appeals Council "will dismiss [the] request for review." 20 C.F.R. 416.1471; see 25 Fed. Reg. 1677, 1682 (Feb. 26, 1960) (20 C.F.R. 404.952(c) (1961)).[4] Since 1980, the regulations have further provided that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." 20 C.F.R. 416.1472; see 45 Fed. Reg. 52,078, 52,096, 52,104 (Aug. 5, 1980). SSA has interpreted this regulation to mean that "an Appeals Council dismissal is not a 'final decision of the Commissioner of Social Security made after a hearing'" within the meaning of 42 U.S.C. 405(g), and thus "is not judicially reviewable." 64 Fed. Reg. 57,687, 57,689 (Oct. 26, 1999); see 20 C.F.R. 416.1403(a)(8) (stating that a denial of a request "to extend the time period for requesting review of * * * a decision" is "not subject to

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[4] The Appeals Council also may dismiss a request for review upon the claimant's request or because of the death of the claimant with no survivor or other parties to the claim. 20 C.F.R. 416.1471.

the administrative review process" and is "not subject to judicial review").[5]

**B. Proceedings In This Case**

1. a. In 1987, petitioner filed an application for supplemental-security-income benefits under Title XVI of the Social Security Act on the basis of disability. Pet. App. 3a. In 1988, an ALJ issued a favorable ruling, and petitioner began receiving benefits. *Ibid.* Those benefits continued until 2004, when they were terminated because petitioner's resources were found to exceed the qualifying threshold. *Ibid.*

b. i. In 2012, petitioner filed a new application for supplemental-security-income benefits, alleging that additional medical conditions rendered him disabled.

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[5] SSA's regulations provide for two other forms of administrative review in limited circumstances. First, the regulations establish an "expedited appeals process" for cases in which the claimant and SSA agree that "the only factor preventing a favorable" ruling for the claimant "is a provision in the law that [the claimant] believe[s] is unconstitutional." 20 C.F.R. 416.1424(d); see 20 C.F.R. 416.1423-416.1428; cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975) (discussing permissibility of dispensing with full exhaustion of the administrative-review process through the Appeals Council stage in such circumstances). That procedure may be commenced at various points during the administrative-review process after issuance of a reconsidered determination until the Appeals Council has acted. See 20 C.F.R. 416.1424(a), 416.1425(a). Second, on a claimant's request or SSA's own motion, SSA may reopen and revise a determination or decision even if the claimant did not timely request administrative review. 20 C.F.R. 416.1487; see 20 C.F.R. 416.1488-416.1489 (specifying deadlines and available grounds for seeking reopening); see also *Califano* v. *Sanders*, 430 U.S. 99, 104-109 (1977) (holding that SSA's denial of a request for reopening is not judicially reviewable absent a constitutional claim). Neither of these avenues for review is at issue here.

Pet. App. 3a. SSA issued an initial determination denying petitioner's application, and upon reconsideration SSA again denied his claim. *Ibid.*

Petitioner filed a timely request for a hearing before an ALJ. Pet. App. 3a. On February 18, 2014, an ALJ conducted a hearing on petitioner's application. *Id.* at 22a-23a. On March 26, 2014, the ALJ issued a decision denying petitioner's claim for benefits, finding that he was not disabled within the meaning of the Act. *Id.* at 3a; J.A. 4-23. The notice of decision sent to petitioner informed him that he had 60 days to file a written appeal in order to obtain review by the Appeals Council, and that an untimely appeal would be dismissed unless petitioner could "show [he] had a good reason for not filing it on time." J.A. 5; see 20 C.F.R. 416.1468, 416.1472. Petitioner was further informed, consistent with SSA's regulations, that if he did not seek review by the Appeals Council and the Appeals Council did not review the ALJ's decision on its own, then the ALJ's "decision [would] become final" and petitioner "[would] not have the right to Federal court review." J.A. 6-7; see 20 C.F.R. 416.1472.

ii. According to petitioner, on April 24, 2014—within the 60-day period for appealing to the Appeals Council—his counsel sent a letter via first-class U.S. mail to the Appeals Council requesting review. See Pet. App. 3a-4a & n.1; D. Ct. Doc. 9, at 1 (Mar. 31, 2016); see also J.A. 24-29 (letter from petitioner's counsel with a date of April 24, 2014). Petitioner further maintains that, at the request of an SSA claims representative, his counsel sent a fax to SSA on September 21, 2014 inquiring about the status of petitioner's request for Appeals Council review and attaching a copy of a letter bearing an April 24, 2014 date requesting review, which counsel asserted

he had timely filed. See Pet. App. 3a; D. Ct. Doc. 9, at 2; see also J.A. 30-37 (fax from petitioner's counsel). On October 1, 2014, the SSA claims representative responded by letter to the September 21 fax, suggesting that SSA had not received petitioner's April 24 letter requesting Appeals Council review because that letter had not been placed in SSA's "electronic folder" and because, if SSA had received the request for Appeals Council review, it would have mailed a receipt. See Pet. App. 3a-4a; D. Ct. Doc. 9, at 2; see also J.A. 38 (letter from SSA claims representative). The claims representative completed a request-for-review form for petitioner, mailed that form to the Appeals Council, and informed petitioner that his appeal request was deemed filed as of October 1. See Pet. App. 4a; D. Ct. Doc. 9, at 2; see also J.A. 38-39.

There is a discrepancy between petitioner's account and SSA's records. An SSA official responsible for the processing of claims for Title XVI benefits in Kentucky has stated in a sworn declaration that, based on her review of SSA's records, the first correspondence SSA received in petitioner's case following the ALJ's decision was a fax from petitioner on October 1, 2014, including an undated request-for-review form, a copy of a letter dated April 24, 2014, and a fax cover sheet dated September 21. J.A. 48-51.

iii. On November 6, 2015, the Appeals Council issued an order dismissing petitioner's appeal as untimely under 20 C.F.R. 416.1471. See J.A. 40-42. The order stated that "[t]he request for review filed on October 1, 2014, was not filed within 60 days from the date notice of the decision was received as required by 20 C.F.R. 416.1468(a)." J.A. 41. The order explained

that, although the deadline could be extended retroactively "if good cause is shown for missing the deadline," the Appeals Council "[found] that there is no good cause to extend the time for filing" here. J.A. 41-42. The order further stated that "[petitioner's] representative submitted a good cause statement on October 1, 2014 indicating he had previously filed a brief on April 24, 2014"—apparently a reference to the September 21, 2014 fax from petitioner's counsel stating that he had requested Appeals Council review on April 24, 2014 and attaching a letter dated April 24—but that "[SSA] did not receive this brief before October 1, 2014," and petitioner's counsel had not "supplied evidence indicating it was sent within the appropriate period of time." J.A. 42. The Appeals Council therefore "dismisse[d] [petitioner's] request for review" and stated that "[t]he [ALJ's] decision stands as the final decision of the Commissioner." *Ibid.* SSA's cover letter enclosing the Appeals Council's order stated that, "[u]nder our rules, the dismissal of a request for review is final and not subject to further review." J.A. 40.

2. a. Petitioner brought this action in the District Court for the Eastern District of Kentucky seeking review of the Appeals Council's order dismissing his request for review. Pet. App. 4a, 23a. The Acting Commissioner of Social Security moved to dismiss for lack of jurisdiction and failure to state a claim, or alternatively for summary judgment, arguing that the Appeals Council's order dismissing petitioner's request for review was not a "final decision" subject to judicial review under 42 U.S.C. 405(g). See D. Ct. Doc. 8, at 2 (Mar. 14, 2016). The Acting Commissioner contended that, under SSA's regulations, "[t]he dismissal of a request for

Appeals Council review is binding and not subject to further review," and that "it is only after the Appeals Council has *denied* review, or has *granted* review and issued its own decision, that the Commissioner has rendered a 'final decision' on the claim for benefits, which is then subject to judicial review pursuant to 42 U.S.C. § 405(g)." *Ibid.* (citing 20 C.F.R. 416.1472).

The district court granted the Acting Commissioner's motion to dismiss. Pet. App. 22a-26a. The court reasoned that, under SSA's regulations, "[r]eview by a federal court is only available once a claimant has completed all of the steps of the administrative process." *Id.* at 24a. The court concluded that "a decision by the Commissioner to dismiss a claimant's untimely request for an appeal before the Appeals Council is not a final decision subject to judicial review, absent the presence of a colorable constitutional claim." *Id.* at 25a.[6] The court relied on SSA's regulation specifying that a decision of the Appeals Council dismissing a request for review as untimely is "binding and not subject to further review," *id.* at 24a (citing 20 C.F.R. 416.1472), and on Sixth Circuit precedent, see *id.* at 24a-25a.

The district court also determined that petitioner had not pleaded a "colorable constitutional claim," rejecting (as relevant here) petitioner's contention that the Due Process Clause of the Fifth Amendment compelled a finding that his request for review had been

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[6] In *Califano* v. *Sanders*, this Court explained that it had "authorized judicial review under [Section 405(g)]," despite a failure to fully exhaust administrative remedies, in cases where enforcing the waivable exhaustion requirement "would effectively have closed the federal forum to the adjudication of colorable constitutional claims." 430 U.S. at 108-109 (citing *Salfi*, *supra*, and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)).

timely submitted. Pet. App. 25a. The court stated that petitioner had not "offer[ed] any proof that he mailed his written request on April 24, 2014, aside from his own testimony." *Ibid.* The court explained that, "[a]bsent independent evidence, such as a postmark or dated receipt," it "[could] not reverse the Appeals Council's determination" of untimeliness. *Ibid.*

Petitioner moved for relief from the judgment under Federal Rule of Civil Procedure 59(e). Pet. App. 16a. The district court denied the motion. *Id.* at 16a-21a.

b. The court of appeals affirmed. Pet. App. 1a-15a. The court observed that, under SSA's regulations, an order by the Appeals Council dismissing a request for review "is binding and not subject to further review," and that "[j]udicial review is available only after administrative exhaustion." *Id.* at 5a (citing 20 C.F.R. 416.1400(a)(5), 416.1471, 416.1472). The court noted that it "ha[d] not directly addressed * * * in a published opinion" whether such Appeals Council dismissals are reviewable under 42 U.S.C. 405(g), but that it had previously held that judicial review was not available in a "similar" context where an ALJ dismissed a request for a hearing as untimely. See Pet. App. 6a (citing *Hilmes* v. *Secretary of Health & Human Servs.*, 983 F.2d 67, 68-70 (6th Cir. 1993)). The court stated that *Hilmes* had "followed the * * * rationale" of this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977), which "held that," when SSA denies "a petition to reopen a prior final decision," judicial review of that denial "is unavailable in the absence of a colorable constitutional claim." Pet. App. 5a-6a. The court of appeals observed that this Court in *Sanders* had "reasoned that[ ] 'an interpretation that would allow a claimant

judicial review simply by filing and being denied a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [42 U.S.C. 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits.'" Pet. App. 5a-6a (quoting 430 U.S. at 108). The court of appeals adhered to its understanding of the reasoning of *Hilmes* and *Sanders* and "conclude[d] that Appeals Council decisions to dismiss untimely petitions for review are not final decisions reviewable in federal court." *Id.* at 8a.

The court of appeals noted that its decision accorded with "the majority view [of the courts of appeals] * * * that the Appeals Council's decision to hear an untimely request for review is discretionary, and refusals of such requests do not constitute 'final decisions' reviewable by district courts," citing decisions of seven other courts. Pet. App. 7a-8a (citing *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998); *Bacon* v. *Sullivan*, 969 F.2d 1517, 1520 (3d Cir. 1992); *Matlock* v. *Sullivan*, 908 F.2d 492, 494 (9th Cir. 1990); *Harper ex rel. Harper* v. *Bowen*, 813 F.2d 737, 743 (5th Cir.), cert. denied, 484 U.S. 969 (1987); *Adams* v. *Heckler*, 799 F.2d 131, 133 (4th Cir. 1986); *Smith* v. *Heckler*, 761 F.2d 516, 518 (8th Cir. 1985); and *Dietsch* v. *Schweiker*, 700 F.2d 865, 867 (2d Cir. 1983)). Only the Eleventh Circuit, the court of appeals continued, had reached a contrary conclusion, in its 1983 decision in *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1238-1239.[7]

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[7] Although not mentioned by the court of appeals here, the Seventh Circuit had recently issued a decision holding, consistent with *Bloodsworth*, that Appeals Council dismissal orders are subject to

The court of appeals specifically endorsed the reasoning of the Eighth Circuit in *Smith*, which had stated that when the Appeals Council dismisses a request for review as untimely, the dismissal order "does not address the merits of the claim, and thus cannot be considered appealable, as can the Appeals Council's decisions and denials of *timely* requests for review." Pet. App. 7a (quoting 761 F.2d at 518). The court here further echoed the Eighth Circuit's statement that, "[i]f the claimant may obtain review in this situation," then "the Secretary's orderly procedures for processing disability claims mean little or nothing," and "any claimant could belatedly appeal his claim at any time and always obtain district court review of an ALJ's decision." *Id.* at 7a-8a (quoting *Smith*, 761 F.2d at 518).

The court of appeals additionally determined that petitioner did not have a colorable due process claim that would be reviewable under 42 U.S.C. 405(g). Pet. App. 8a-14a. As relevant here, the court rejected petitioner's contention that the Appeals Council violated his due process rights by refusing to consider what petitioner maintained was a timely-submitted request for review, citing a "lack of independent evidence" to corroborate petitioner's assertion that he in fact submitted his request on time. *Id.* at 10a.

## SUMMARY OF ARGUMENT

The government urged the courts below—consistent with the Social Security Administration's longstanding position—that the Appeals Council order dismissing petitioner's request for review as untimely is not judi-

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judicial review. See *Casey* v. *Berryhill*, 853 F.3d 322, 326 & n.1 (2017).

cially reviewable. The government has, however, reconsidered the question and has now concluded that a dismissal order is subject to judicial review, limited to the procedural ground on which the agency based its dismissal.

A. The Appeals Council order dismissing petitioner's appeal was a "final decision * * * made after a hearing" within the meaning of 42 U.S.C. 405(g), as incorporated by 42 U.S.C. 1383(c)(3). SSA's regulations are clear that, following the dismissal order, the agency will take no further action in petitioner's case. 20 C.F.R. 416.1472. That order is therefore a "final decision" both in the ordinary sense and as that term is typically used in administrative law. The order marked the end of the agency's adjudicative process, and it has legal consequences because it constituted the agency's conclusive determination that petitioner's administrative appeal was not timely and so petitioner was not entitled to pursue his benefits claim any further in the agency. The agency's decision was made "after a hearing" as that term is used in Section 405(g), because petitioner in this case had a hearing before an administrative law judge, and because petitioner complied with the procedures required of him by SSA regulations to obtain a decision from the agency regarding timeliness, see 20 C.F.R. 416.1468.

The availability of judicial review in this case is confirmed by a separate sentence of Section 405(g) providing that where SSA has issued an adverse decision because of the claimant's "failure * * * to submit proof in conformity with [an agency] regulation," judicial review will not be entirely foreclosed, but will be narrow: "[T]he court shall review only the question of conformity with [the agency's] regulations." 42 U.S.C.

405(g). That limited authorization of judicial review is consistent with the general administrative-law principle that a court reviewing an agency decision is limited to reviewing the grounds the agency gave for its decision. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943). That the Act explicitly addresses the scope of judicial review when the claimant has not complied with a regulatory requirement supports the conclusion that petitioner may seek judicial review of the Appeals Council's determination that he did not comply with the regulation governing requests for Appeals Council review.

Reading Section 405(g) to authorize judicial review of the Appeals Council's untimeliness decision accords with this Court's, and lower courts', interpretation of other statutory exhaustion and finality requirements, according to which courts may review an agency's decision whether a claimant exhausted administrative remedies. Judicial review also avoids the potential for a claimant to be wrongly denied benefits should the agency commit a clear error regarding timeliness or another procedural requirement.

B. The reasons advanced by a number of courts of appeals to support their conclusion that an Appeals Council dismissal order is not judicially reviewable under 42 U.S.C. 405(g) are unpersuasive. If those courts were correct that a dismissal order is not a "final decision" or was not made "after a hearing," *ibid.*, then the agency would never issue a final decision in the claimant's case, because the agency's regulations are clear that it will take no further action following the dismissal. See 20 C.F.R. 416.1472. That result would be inconsistent with the statute, which "direct[s]" the agency to issue a "decision[ ]" on every application for benefits. 42 U.S.C. 405(b)(1), 1383(c)(1)(A).

It makes no difference that the Appeals Council did not hold an oral hearing before dismissing petitioner's appeal, because SSA regulations call for a timeliness question to be resolved by written submissions rather than an oral hearing, and this Court has concluded that the "after a hearing" requirement in 42 U.S.C. 405(g) is not a barrier to judicial review where, as here, the agency has determined that no such hearing is necessary. See *Weinberger* v. *Salfi*, 422 U.S. 749, 767 (1975). It likewise makes no difference that the Appeals Council order did not address the merits of petitioner's claim for benefits, because Section 405(g) does not limit judicial review to cases in which the most recent agency ruling addressed the merits of the claim.

This Court's holding in *Califano* v. *Sanders*, 430 U.S. 99 (1977), does not carry over to a conclusion that Appeals Council dismissal orders are not judicially reviewable. There are important differences between SSA's discretionary decision to reopen an already-final decision—at issue in *Sanders*—and the agency's decision in this case that petitioner did not exhaust administrative remedies, which is a question courts ordinarily review. In addition, the Court in *Sanders* sought to preserve Congress's 60-day limit for a claimant to seek judicial review of final administrative orders, but that limit is not at issue in this case.

Although the court of appeals' holding in this case is consistent with SSA's longstanding regulation, that regulation exceeds the agency's rulemaking authority because it is "inconsistent with the provisions" of the Act. 42 U.S.C. 405(a). The agency has significant discretion to determine what procedures a claimant must follow to exhaust administrative remedies, and whether to waive exhaustion for any particular claimant. But the

agency does not have authority to preclude judicial review of the Appeals Council's order finding untimeliness. Judicial review in this case would not undermine the agency's detailed requirements for administrative review. The very question petitioner seeks to have the court decide is whether he complied with the agency's procedural requirements. The statute provides for the court to answer that question—but "only" that question—and to afford the agency appropriate deference by looking only to whether SSA's factual findings are supported by "substantial evidence," 42 U.S.C. 405(g), and whether a failure to find good cause to excuse a late filing was an abuse of discretion. That limited form of judicial review does not meaningfully threaten SSA's administrative-review system.

## ARGUMENT

### A SOCIAL SECURITY APPEALS COUNCIL ORDER DISMISSING A REQUEST FOR REVIEW AS UNTIMELY IS JUDICIALLY REVIEWABLE UNDER 42 U.S.C. 405(g)

The court of appeals' conclusion that "Appeals Council decisions to dismiss untimely petitions for review are not final decisions reviewable in federal court" under the Social Security Act, Pet. App. 8a, was consistent with the government's longstanding position, which has been reflected in SSA regulations in force since 1980. See pp. 9-10, *supra*.[8] Until 2017, that position had been endorsed by all but one of the courts of appeals to address the issue. See p. 16, *supra*. The government

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[8] Before SSA codified its position by regulation, the agency similarly maintained that an Appeals Council dismissal of a request for review as untimely was not judicially reviewable. See, *e.g.*, *Sheehan* v. *Secretary of Health, Educ. & Welfare*, 593 F.2d 323, 325-326 (8th Cir. 1979) (holding that Appeals Council dismissal was not reviewable).

advocated that position in this case: In the district court and the court of appeals, the Acting Commissioner of Social Security contended that SSA has validly promulgated a regulation providing that an Appeals Council dismissal of a request for review does not constitute a "final decision" subject to judicial review under 42 U.S.C. 405(g). Gov't C.A. Br. 8-12; D. Ct. Doc. 8, at 1-2. The government has taken that position in many other cases and other contexts as well.[9]

In light, however, of the petition for a writ of certiorari in this case and the Seventh Circuit's recent contrary decision in *Casey* v. *Berryhill*, 853 F.3d 322 (2017), the government reexamined the question and concluded that its prior position was incorrect, as explained in the government's response to the certiorari petition.[10] The Appeals Council order dismissing petitioner's request for review—by which SSA conclusively determined the timeliness of petitioner's appeal request and also made clear that it will take no further action on petitioner's claim for benefits—is a "final decision," both in the ordinary sense of that term and under its customary usage in administrative law. Such decisions are subject to judicial review under 42 U.S.C. 405(g). Although SSA has authority to prescribe what steps a claimant must follow in order to exhaust administrative remedies,

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[9] See, *e.g.*, Br. in Opp. at 10 n.4, *Lary* v. *Chater*, 522 U.S. 812 (1997) (No. 96-1849) (arguing in a Medicare case also governed by Section 405(g) that an Appeals Council dismissal was not reviewable).

[10] Following this Court's grant of the petition for a writ of certiorari in this case, SSA has begun the process of revising its notice to claimants who receive Appeals Council orders dismissing petitions for review as untimely, and this Office has directed that the government not argue to federal courts that they may not review an Appeals Council dismissal order, pending this Court's decision in this case.

*Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975), and generally has discretion whether to waive the requirement of complete exhaustion through the Appeals Council stage as a precondition to judicial review, *Bowen* v. *City of New York*, 476 U.S. 467, 483 (1986), SSA's authority and discretion in those respects do not deprive federal district courts of authority to review whether a claimant has complied with the exhaustion requirement. Petitioner's complaint in this case sought judicial review on *that* question, and the district court's dismissal of that request for relief was error.

### A. Section 405(g) Authorizes Judicial Review Of The Appeals Council's Conclusion That A Claimant Failed To Exhaust Administrative Remedies

The relevant question on which petitioner seeks judicial review in this case is whether he submitted a timely appeal to the SSA Appeals Council, with the result that he may continue contesting (before the agency) the ALJ's determination that he is not entitled to benefits: Petitioner alleged in his complaint that the ALJ's "denial decision was timely appealed to the Appeals Council on April 24, 2014[,] which the Appeals Council improperly dismissed," and that he "has exhausted all of his administrative remedies." J.A. 46.[11] Section 405(g), as incorporated by 42 U.S.C. 1383(c)(3), permits judicial review on the timeliness question if the Acting Commissioner has rendered "a 'final decision' * * * after a 'hearing.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976) (quoting 42 U.S.C. 405(g)). She has. In the

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[11] Petitioner's complaint also requested judicial review of the question on the merits whether he is entitled to benefits. J.A. 46-47. But petitioner is not entitled to judicial review of that question at this time, as explained at pages 29-30, *infra*.

course of administrative proceedings on his benefits application, petitioner submitted the timeliness question to SSA using the procedure the agency's regulations afforded him. J.A. 30-37. The Appeals Council, after considering the question, reached a conclusive determination regarding timeliness that it will not revisit, and dismissed petitioner's request for review. J.A. 40-42. The result of that dismissal was to leave standing and render binding the ALJ's rejection on the merits of petitioner's claim for benefits. See 20 C.F.R. 416.1455. Simply put, there was nothing left for the agency to consider or do. The Appeals Council's order dismissing petitioner's request for review as untimely is accordingly final and subject to judicial review.

1. This Court has held that Section 405(g)'s "condition" on judicial review "consists of two elements": a "jurisdictional," "nonwaivable * * * requirement that a claim for benefits shall have been presented to the [Commissioner]," and a nonjurisdictional, "waivable * * * requirement that the administrative remedies prescribed by the [Commissioner] be exhausted." *Eldridge*, 424 U.S. at 328; accord *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 15 (2000) (Section 405(g) imposes a "nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court," and an additional requirement that a claimant exhaust "the procedural steps set forth in § 405(g)").[12] Here, both requirements

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[12] Because Section 405(g)'s exhaustion requirement is "waivable," *Eldridge*, 424 U.S. at 328, the court of appeals erred in holding that petitioner's complaint should be dismissed "for lack of subject matter jurisdiction," Pet. App. 5a, even if this Court concludes—contrary to the government's present position—that the Appeals

were satisfied. The nonwaivable presentment requirement was satisfied because petitioner "presented" his "claim for benefits" to SSA by filing an application, *Eldridge*, 424 U.S. at 328; see Pet. App. 3a, and also presented to the agency the question on which he now seeks judicial review: whether he timely submitted his request for Appeals Council review. See Pet. App. 3a-4a, J.A. 30-37.

Section 405(g)'s waivable exhaustion-of-remedies requirement—that SSA must have rendered a "final decision" made "after a hearing," *Eldridge*, 424 U.S. at 328 (citation and internal quotation marks omitted)—is satisfied as well. The Social Security Act "does not define 'final decision.'" *Sims* v. *Apfel*, 530 U.S. 103, 106 (2000). "When a term goes undefined in a statute," the Court typically will "give the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). And where an undefined statutory phrase is a "term of art" or otherwise has a well-established meaning in a given statutory context, the Court will consult that meaning. *Magwood* v. *Patterson*, 561 U.S. 320, 332 (2010) (citation omitted); see also, *e.g.*, *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 612-613 (1992). Here, both the ordinary meaning of "final decision" and its familiar meaning in the context of administrative adjudications point to the conclusion that Appeals Council dismissal orders are final decisions under 42 U.S.C. 405(g).

a. SSA indisputably reached a "decision"—a determination after consideration—on both the timeliness of petitioner's request for Appeals Council review and whether he will be permitted to pursue his benefits

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Council's dismissal order was not a "final decision" reviewable under 42 U.S.C. 405(g).

claim further. See *Webster's New International Dictionary of the English Language* 680 (2d ed. 1949) (defining "decision" as "a determination or result arrived at after consideration, as of a question"). The Appeals Council determined that petitioner did not "sen[d]" his request for review within the 60-day limit established by regulation, and that "there is no good cause to extend the time for filing," with the result that the ALJ's "decision stands as the final decision of the Commissioner." J.A. 42.

b. SSA's decision was "final." In ordinary usage, a decision is "final" if it "[p]ertain[s] to, or occur[s] at, the end or conclusion" of a process, or if it is "[c]onclusive," "decisive," or "definitive." *Webster's New International Dictionary* 948. An Appeals Council order dismissing as untimely a request for review of an ALJ decision is final under each of those definitions. SSA's regulations provide that such a dismissal order "is binding and not subject to further review." 20 C.F.R. 416.1472. The dismissal order thus marks the end of SSA's consideration of a benefits application and is conclusive of whether the claimant will be permitted to further pursue his claim for benefits in the agency.

In the administrative-law context, this Court's precedent ascribes a similar meaning to "final" agency action. For purposes of the availability of judicial review under the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237, 5 U.S.C. 551 *et seq.*, 701 *et seq.*, 5 U.S.C. 704, the Court has explained that, "[a]s a general matter, two conditions must be satisfied for agency action to be 'final.'" *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997) (citation omitted). "First, the action must mark the 'consummation' of the agency's decisionmaking

process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-178 (quoting *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). "[S]econd, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

An Appeals Council dismissal order bears both of those "hallmarks of APA finality." *Sackett* v. *EPA*, 566 U.S. 120, 126 (2012). Such an order does not represent a "merely tentative or interlocutory" determination, but instead marks the end of the agency's consideration. *Bennett*, 520 U.S. at 178. SSA's regulations provide that the agency will not "review" the dismissal order further. 20 C.F.R. 416.1472. The dismissal order also has "legal consequences" and determines the claimant's "rights [and] obligations," *Bennett*, 520 U.S. at 178 (citation omitted), because it renders binding the ALJ's decision regarding the applicant's entitlement to receive the requested benefits and bars the claimant from contesting the ALJ's decision further in the agency. 20 C.F.R. 416.1455 (ALJ's decision is "binding" if not reviewed); see *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983) (an "Appeals Council decision not to review *finalizes* the decision made after a hearing by the [ALJ]"). Although the APA was enacted in 1946, see ch. 324, 60 Stat. 237—after 42 U.S.C. 405(g) (Supp. V 1939), which was enacted in 1939, see Social Security Act Amendments of 1939, ch. 666, Tit. II, sec. 201, § 205(g), 53 Stat. 1370-1371—the APA codified preexisting principles of judicial review of agency action, see, *e.g.*, *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S.

270, 282 (1987), and is instructive on the meaning of "final decision" under 42 U.S.C. 405(g).

c. The Appeals Council's dismissal of petitioner's request for review also satisfies the "after a hearing" condition on judicial review, as that phrase is used and has been understood in 42 U.S.C. 405(g). The ALJ's decision regarding petitioner's claim for benefits, J.A. 4-23, was made after the ALJ conducted an oral hearing on petitioner's application in February 2014. See Pet. App. 22a-23a. And whereas the Appeals Council's decision regarding the timeliness of petitioner's request for review was not the subject of an oral hearing, that is because SSA's regulations do not call for an oral hearing to resolve a question of timeliness; the regulations instead directed petitioner to submit a request to the Appeals Council in writing. See 20 C.F.R. 416.1468. The Appeals Council issued its decision regarding timeliness and dismissed petitioner's request for review after petitioner completed the procedure required by the agency's regulations: he submitted a written request for review and explained why he believed his request was timely filed. See *ibid.*; Pet. App. 3a-4a; J.A. 30-37.

In *Salfi*, this Court held that Section 405(g)'s "after a hearing" requirement was not a barrier to judicial review of questions on which the Secretary had concluded that no hearing was required, 422 U.S. at 767, and the Court explained that "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue," *id.* at 765. Because the administrative scheme here called for review by the Appeals Council after an ALJ hearing, and called for the Appeals Council to resolve the timeliness

issue based on petitioner's written submission, the prerequisites for judicial review under Section 405(g) were satisfied.

2. A separate sentence of Section 405(g) supports the conclusion that an Appeal Council dismissal of a request for review as untimely is judicially reviewable. That sentence provides that "where a claim has been denied by the Commissioner * * * because of failure of the claimant * * * to submit proof in conformity with any regulation prescribed under [42 U.S.C. 405(a)]," judicial review will remain available but will be narrow: "[T]he court shall review only the question of conformity with [the agency's] regulations and the validity of such regulations." 42 U.S.C. 405(g). That limited authorization of judicial review accords with the general administrative-law principle that a court reviewing an agency decision is limited to reviewing the grounds the agency gave for its decision. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

Here, that sentence in Section 405(g) indicates that a court likewise may review a claimant's compliance with SSA regulations regarding the timeliness of a request for Appeals Council review of an ALJ's decision. In this case, the Acting Commissioner issued a final, adverse decision that denied petitioner the opportunity to further challenge the ALJ's decision, on the ground that he had failed to submit his claim for benefits to the Appeals Council in conformity with the agency's timeliness regulation for seeking Appeals Council review, 20 C.F.R. 416.1468(a), which the agency prescribed pursuant to Section 405(a). As a result, a federal court may review "only" whether petitioner "conform[ed]" with the agency's regulation, and the agency's factual findings on that question "shall be conclusive" as long as

they are "supported by substantial evidence." 42 U.S.C. 405(g). That is, the court may review whether the agency's finding that petitioner did not submit a timely appeal to the Appeals Council is supported by substantial evidence, and whether the agency abused its discretion in concluding that good cause for excusing untimeliness did not exist; but the court may not go further and review now whether petitioner is entitled to benefits. See, *e.g.*, *Casey*, 853 F.3d at 329 (rejecting SSA's determination regarding timeliness but explaining that, because there was "no 'final decision' on the underlying merits" of the plaintiff's benefits application, the merits were "a question for the agency to consider on remand") (citation omitted).[13] The Act does not, however, entirely foreclose judicial review of whether petitioner complied with the agency's regulations. It follows that SSA's regulations providing that an Appeals Council order dismissing a request for review as untimely is not subject to judicial review are inconsistent with the Act and should not be given effect.

3. Section 405(g)'s authorization of judicial review in this case, limited to review of the agency's determination of untimeliness, is consistent with the federal courts' approach to exhaustion in other contexts. There are many other statutes that, like the Social Security Act, impose statutory exhaustion requirements—often

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[13] In *Bloodsworth*, the court of appeals correctly found that the Appeals Council's timeliness conclusion was judicially reviewable, but the court then incorrectly proceeded to consider the merits of the claimant's entitlement to benefits. See 703 F.2d at 1239-1243. The *Bloodsworth* court did not explain why it believed it was permitted to review the merits, notwithstanding *Chenery* and 42 U.S.C. 405(g).

similarly calling for judicial review after an agency's "final decision" or "final order"—but lower courts routinely treat agency dismissals on untimeliness or other procedural or jurisdictional grounds as final, and the courts review whether the plaintiff exhausted administrative remedies (or should be excused from the obligation to do so). See, *e.g.*, *Higgs* v. *Attorney Gen. of the U.S.*, 655 F.3d 333, 338 (3d Cir. 2011) (overturning agency's determination that petitioner failed to properly file an administrative appeal); *Auburn Reg'l Med. Ctr.* v. *Sebelius*, 642 F.3d 1145, 1147-1148 (D.C. Cir. 2011) (agency dismissal on timeliness grounds "is final in any sense of the word" under statute authorizing judicial review of "any final decision" of the agency), rev'd on other grounds, 568 U.S. 145 (2013); *Khan* v. *U.S. Dep't of Justice*, 494 F.3d 255, 259-260 (2d Cir. 2007) (reviewing agency decision that administrative appeal was untimely pursuant to provision of Immigration and Nationality Act authorizing judicial review of a "final order of removal"); *Cox* v. *Benefits Review Bd.*, 791 F.2d 445, 446-447 (6th Cir. 1986) (per curiam) (reviewing agency decision that administrative petition for review was insufficient to exhaust administrative remedies).

Reading Section 405(g) to authorize judicial review of the Appeals Council's timeliness determination also accords with the courts of appeals' routine practice of treating district-court decisions dismissing cases on jurisdictional or procedural grounds as "final decisions" reviewable under 28 U.S.C. 1291. See, *e.g.*, *Farzana K.* v. *Indiana Dep't of Educ.*, 473 F.3d 703, 708 (7th Cir. 2007); *Loya* v. *Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 281 (9th Cir. 1983); *Athens Cmty. Hosp., Inc.* v. *Schweiker*, 686 F.2d 989, 993 (D.C. Cir. 1982), modified on reh'g, 743 F.2d 1 (D.C. Cir. 1984). This

Court has compared Section 405(g)'s "final decision" requirement to 28 U.S.C. 1291, and in doing so has stated that its "core principle" for interpreting "statutorily created finality requirements" is that those requirements "should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Eldridge*, 424 U.S. at 331 n.11.

As applied to the Social Security Act, the core principle identified by the Court supports giving Section 405(g) its most natural interpretation, which is to authorize judicial review of the Appeals Council's decisions regarding untimeliness. Under the contrary interpretation, if the Appeals Council's determination that a claimant did not timely request review is not supported by substantial evidence—or if the Appeals Council abused its discretion in finding no good cause to extend the deadline—then the claimant would be erroneously deprived of his statutory right to have a court review his entitlement to benefits at the conclusion of the agency's process. See 42 U.S.C. 405(g), 1383(c)(3).

### B. The Court Of Appeals' Reasons For Refusing Judicial Review Are Not Persuasive

The court of appeals erred in holding that the SSA Appeals Council order dismissing petitioner's request for review of the ALJ's adverse decision entirely foreclosed judicial review of whether petitioner' administrative appeal was timely. As stated above, a number of other courts of appeals have reached the same conclusion, which comported with the government's longstanding position.[14] But on reexamining the question,

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[14] See, *e.g.*, *Rothman* v. *Secretary of Health & Human Servs.*, 70 F.3d 110, 1994 WL 866086, at *1 (1st Cir. Dec. 8, 1994) (Tbl.);

the government has concluded that the reasoning in those decisions does not offer a sound basis for overriding the right to judicial review that Congress afforded to benefits applicants in 42 U.S.C. 405(g).

1. The court of appeals' conclusion that Appeals Council dismissal orders "are not final decisions," Pet. App. 8a, is inconsistent with the statutory structure and the practical effect of such an order. Upon issuance of the Appeals Council dismissal order, SSA's decision in petitioner's case was "final," for the reasons explained above. See pp. 26-28, *supra*. That order unequivocally marked the agency's last word on petitioner's benefits application; it was "not pending, interlocutory, tentative, conditional, doubtful, unsettled, or otherwise indeterminate." *Auburn Regional*, 642 F.3d at 1148. SSA regulations state that the dismissal "is binding and not subject to further review," 20 C.F.R. 416.1472, so after the dismissal order, there was nothing left for the agency (or petitioner) to do regarding his claim. The agency "[was] done." *Auburn Regional*, 642 F.3d at 1148.[15]

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*Bacon* v. *Sullivan*, 969 F.2d 1517, 1519-1522 (3d Cir. 1992); *Dillow* v. *Sullivan*, 952 F.2d 1396, 1992 WL 6810, at *1 (4th Cir. Dec. 5, 1992) (per curiam) (Tbl.); *Harper ex rel. Harper* v. *Bowen*, 813 F.2d 737, 739-743 (5th Cir.), cert. denied, 484 U.S. 969 (1987); *Smith* v. *Heckler*, 761 F.2d 516, 518-519 (8th Cir. 1985); *Matlock* v. *Sullivan*, 908 F.2d 492, 493-494 (9th Cir. 1990); *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 & n.2 (10th Cir. 1998); see also *Dietsch* v. *Schweiker*, 700 F.2d 865, 867-868 (2d Cir. 1983) (holding that review under Section 405(g) is unavailable and that review can be obtained only through a writ of mandamus)

[15] The only exception would be if SSA elected to reopen petitioner's case. See 20 C.F.R. 416.1487. But whether to reopen a case is entirely discretionary with the agency and is not subject to judicial review. See *Califano* v. *Sanders*, 430 U.S. 99, 104-109 (1977). SSA

Some of this Court's opinions have stated that "[i]f a claimant fails to request review from the [Appeals] Council, there is no final decision and, as a result, no judicial review in most cases." *Sims*, 530 U.S. at 107; see also *City of New York*, 476 U.S. at 482 ("Only a claimant who proceeds through all three stages [of administrative review] receives a final decision from the Secretary."). But the context of those decisions makes clear that the Court was describing the typical steps in the agency's regulations for a claimant to obtain judicial review of *the merits* of a benefits determination, and the consequence if the claimant does not pursue the claim through the entire administrative process. The Court has never had occasion to consider the question presented here, which is whether, when the claimant does seek Appeals Council review, the Appeals Council's order dismissing the request for review on untimeliness grounds precludes the district court from reviewing whether the claimant's request for administrative review was, in fact, untimely.

The court of appeals' interpretation of "final decision" is also inconsistent with other provisions of the Act. If the court's understanding of the Appeals Council's dismissal order were correct, then the agency would very likely *never* issue a "final decision" on petitioner's benefits application, 42 U.S. 405(g), because the agency has been clear that it will not take any further action following a dismissal. 20 C.F.R. 416.1472. As the Eleventh Circuit recognized in *Bloodsworth*, if Appeals Council dismissal orders were not reviewable, then "the claimant would never have a 'final' decision" and would be left "permanently in limbo." 703 F.2d at 1239. But

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regulations did not require petitioner to request reopening before seeking judicial review. See 20 C.F.R. 416.1400(a)(4)-(5).

that result is difficult to square with the statutory "direct[ive]" to the Commissioner to issue a "decision[ ]" on each application for benefits. 42 U.S.C. 405(b)(1), 1383(c)(1)(A).

2. The Ninth Circuit, in an opinion reaching the same result as the decision below, relied on the fact that the Appeals Council did not itself hold a hearing before denying a request for an extension of time to appeal and dismissing a request for review. *Matlock* v. *Sullivan*, 908 F.2d 492, 493-494 (1990) (finding that the agency had no "final decision[ ] * * * made after a hearing" because "the Appeals Council may deny a request for an extension without a hearing") (citation omitted). That reasoning rests on a misunderstanding of the phrase "after a hearing" in Section 405(g).

That SSA's regulations permit the agency to resolve a question of timeliness without an oral hearing does not undermine petitioner's entitlement to judicial review of that question. In *Salfi*, this Court upheld the claimants' right to judicial review of a challenge to the agency's denial of benefits based on statutory provisions making certain family members ineligible for mothers' and children's insurance benefits. See 422 U.S. at 766. Although SSA had not held an oral hearing in the course of denying the claims, the Court noted that SSA "may, of course, award benefits without requiring a hearing" and held that Section 405(g) permits judicial review where the Commissioner has made a final decision on issues "as to which he considers a hearing to be useless." *Id.* at 767; cf. *Eldridge*, 424 U.S. at 330 ("[T]he Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief

that is sought is beyond his power to confer."). This Court's cases thus stand for the proposition that, where SSA has determined that an oral hearing is not necessary to issue a final decision, judicial review of that decision is not barred for lack of a hearing.

Section 405(h) further reinforces the conclusion that an oral hearing is not always necessary to produce a binding and reviewable agency decision. That provision, which makes Section 405(g) the exclusive route to judicial review of SSA benefits decisions, also specifies that "[t]he findings and decision of the Commissioner of Social Security *after a hearing* shall be binding upon all individuals who were parties to such hearing." 42 U.S.C. 405(h) (emphasis added). Although Section 405(h) uses the same "hearing" language as Section 405(g), the statutory and regulatory scheme clearly contemplates decisions by the agency that are final and binding even though no hearing occurred. For example, this Court in *Salfi* held that Section 405(h)'s preclusion of review outside of Section 405(g) applies even where a claimant raises a constitutional challenge to the Act, and the Court approved SSA's authority to permit a claimant to proceed directly to federal court for resolution of that constitutional question, without the agency holding a hearing or completing the administrative-review process. See 422 U.S. at 757-761, 766-767. Similarly, SSA regulations permit an ALJ to issue a decision without holding an oral hearing where all parties agree that they do not want a hearing, 20 C.F.R. 416.1448(b)(i), and those decisions are entitled to binding effect under Section 405(h).

By the same logic, the "hearing" requirement of Section 405(g) is satisfied through the procedures the

agency deems necessary to render a binding, final decision on a benefits claim. Courts of appeals have nonetheless disagreed about, for example, whether an ALJ decision dismissing as untimely a request for the ALJ "hearing" on the merits that Section 405 contemplates satisfies the requirement that SSA's decision be made "after a hearing" in order to be subject to judicial review. 42 U.S.C. 405(g). Compare, *e.g.*, *Hilmes* v. *Secretary of Health & Human Servs.*, 983 F.2d 67, 69-70 (6th Cir. 1993) (holding judicial review of dismissal of request for ALJ hearing is not available because no "hearing" has occurred) (citation and emphasis omitted), with *Boley* v. *Colvin*, 761 F.3d 803, 806 (7th Cir. 2014) (holding review is available even where an ALJ decides "not to hold an oral hearing").

Although an oral hearing took place before an ALJ in this case and the issue accordingly is not directly presented here, the logic of this Court's precedents suggests that, where an ALJ hearing has been requested but the ALJ has dismissed the request as untimely—or where the ALJ has determined that an oral hearing is unnecessary for the agency to conclusively resolve a claim for benefits—the "after a hearing" condition is not a barrier to judicial review, limited to the grounds on which the agency's decision was based. 42 U.S.C. 405(g); see *Salfi*, 422 U.S. at 767 (review is available under Section 405(g) where SSA forgoes a hearing on issues "as to which [the Commissioner] considers a hearing to be useless"). A contrary interpretation of Section 405(g) would, again, leave the claimant "permanently in limbo" without an opportunity to access his statutory right to judicial review. *Bloodsworth*, 703 F.2d at 1239.

3. The court of appeals below adopted the Eighth Circuit's view that an Appeals Council dismissal on untimeliness grounds is not final because it "does not address the merits of the claim" for benefits. Pet. App. 7a (quoting *Smith* v. *Heckler*, 761 F.2d 516, 518 (8th Cir. 1985)). But this case, like *Smith*, is not about judicial review of the merits of petitioner's claim for benefits; petitioner is limited by Section 405(g) to judicial review of the Appeals Council's determination regarding his conformity with SSA's timeliness regulation. Petitioner presented that question to the agency and pursued it as far as he could, Pet. App. 3a-4a; the Appeals Council unambiguously addressed it, see J.A. 41-42; and the Appeals Council's conclusion on the point "is binding and not subject to further review," 20 C.F.R. 416.1472.

Section 405(g) does not limit judicial review to cases in which the most recent agency ruling addressed the underlying merits. And as explained above, when courts have confronted similar agency decisions in other contexts finding that a plaintiff failed to properly exhaust administrative remedies, courts have not suggested that a ruling on the underlying merits is necessary in order to render the agency's decision "final" and subject to review on whether the plaintiff did fail to exhaust administrative remedies. See pp. 30-31, *supra*.

4. The court below, like other courts of appeals, also found support for its position in the "rationale" of this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977). Pet. App. 6a; see also, *e.g.*, *Matlock*, 908 F.2d at 493-494. But *Sanders* involved a different question.

In *Sanders*, this Court held that SSA's denial of a request to reopen a prior final decision was not subject to judicial review under Section 405(g). 430 U.S. at 108. The Court explained that "the opportunity to reopen

final decisions * * * [is] afforded by the Secretary's regulations and not by the Social Security Act." *Ibid.* The Court further reasoned that "allow[ing] a claimant judicial review simply by filing—and being denied—a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [Section 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits." *Ibid.* "In other words, one opportunity for judicial review is enough," and "a claimant who bypasses that chance cannot create another by a procedure that would evade a statutory deadline." *Boley*, 761 F.3d at 807.

That is not what happened here. As the Eleventh Circuit has explained, "review and reopening play fundamentally different roles in the process of administrative decision making and have significantly different effects upon the finality of administrative decisions." *Bloodsworth*, 703 F.2d at 1237. Reopening "is an extraordinary measure, affording the opportunity of a second excursion through the decision making process." *Id.* at 1238. In contrast, review by the Appeals Council is "a normal stage in the administrative review procedure, available as of right to any party." *Id.* at 1237; see 20 C.F.R. 416.1400(a)(4). It is not "a bonus opportunity" for review after the ordinary process of administrative review has been completed, but part of that administrative-review process. 703 F.2d at 1238. And it is the part of the process that immediately precedes the claimant's ability to exercise his right to judicial review. 20 C.F.R. 416.1400(a)(4)-(5). Although the Eighth Circuit has stated that "the Appeals Council's discretionary action in hearing an *untimely* request for review is as much a 'bonus opportunity' as is reopening," *Smith*, 761 F.2d at 519 (emphasis added), that reasoning merely assumes

the result of the very issue that petitioner seeks to raise before the court in this case: whether the Appeals Council erred in finding that his request for review was untimely.

Contrary to the court of appeals' reasoning below, judicial review in this case is not inconsistent with Congress's "purpose * * * to impose a 60-day limitation upon judicial review," Pet. App. 6a (quoting *Sanders*, 430 U.S. at 108), because there is no dispute that petitioner filed his complaint in court within the 60 days required by the statute. Nor would judicial review here involve "repetitive or belated litigation of stale eligibility claims." *Matlock*, 908 F.2d at 494 (quoting *Sanders*, 430 U.S. at 108). Again, the question for the district court to resolve is whether petitioner's claim for benefits remained timely, as opposed to stale, in the administrative process.

5. The court of appeals below, like other courts to address the issue, relied on SSA's regulations stating that an Appeals Council dismissal of a request for review as untimely is not subject to judicial review. Pet. App. 5a (citing 20 C.F.R. 416.1400(a)(5), 416.1471, 416.1472); see also 20 C.F.R. 416.1403(a)(8) (stating that a denial of a request to extend the time to request review of a determination or a decision is "not subject to judicial review"); 64 Fed. Reg. at 57,689 (stating that "an Appeals Council dismissal is not a 'final decision of the Commissioner of Social Security made after a hearing'" and thus "is not judicially reviewable").

This Court has recognized that, because the Social Security Act does not define the term "'final decision,'" and because 42 U.S.C. 405(a) grants the Commissioner authority to adopt regulations setting out necessary and

appropriate procedures to conduct administrative review of benefits applications, the meaning of the term "'final decision'" is largely "left to the [Commissioner] to flesh out by regulation." *Salfi*, 422 U.S. at 766 (citation omitted). But the regulations adopted by the agency must be "not inconsistent with the provisions of" the Act. 42 U.S.C. 405(a). As described above, Congress has directed SSA to provide for a "hearing" and reach a "decision" on each benefits application, 42 U.S.C. 405(b)(1); it has conferred a right to judicial review of the agency's "final decision," 42 U.S.C. 405(g); and it has specified what form of judicial review is permitted when the agency's adverse decision is based on the claimant's procedural non-compliance, *ibid.* A regulation that attempts to label the agency's last word on a benefits application as something other than a "final decision," that suggests the agency will never issue a final decision on that application, and that deprives the claimant of his statutory right to judicial review altogether for missing an administrative deadline, is inconsistent with the Act and thus beyond the authority conferred on the agency by Section 405(a).

To be sure, Section 405(a) grants the Commissioner discretion to "specify such requirements for exhaustion as [she] deems serve [her] own interests in effective and efficient administration." *Salfi*, 422 U.S. at 766. SSA is thereby empowered to establish the steps in the administrative-review process that a claimant must pursue, to say by when he must pursue them, and to determine when its own review is complete so that judicial review may be sought. See, *e.g.*, *Bowen* v. *Yuckert*, 482 U.S. 137, 145 (1987) (upholding SSA's regulation requiring disability claimants to make a threshold showing of the severity of their disability). But it does not follow from

the agency's discretion to adopt procedural exhaustion requirements that SSA has authority to reserve for itself alone the question whether petitioner complied with those requirements. See *Bloodsworth*, 703 F.2d at 1239. In any particular case, SSA does generally have discretion whether to continue considering a particular claim for benefits, or instead to terminate its consideration, make its ruling binding, and allow judicial review. But once the Appeals Council decided to dismiss petitioner's request for review and made clear that it would take no further action on petitioner's benefits claim, the Act made the Commissioner's final decision subject to judicial review. The agency cannot alter that result by regulation.

6. Finally, the court of appeals here expressed the view, adopting the reasoning of the Eighth Circuit, that if Appeals Council dismissal orders are judicially reviewable, then "the Secretary's orderly procedures for processing disability claims mean little or nothing," because a claimant could "avoid the timely exhaustion of remedies requirement" and "could belatedly appeal his claim at any time and always obtain district court review of an ALJ's decision." Pet. App. 7a-8a (quoting *Smith*, 761 F.2d at 518). That reasoning is unpersuasive in several respects.

In the first place, petitioner claims that he did not "avoid" the agency's exhaustion requirement, Pet. App. 8a (citation omitted), because he alleges that he attempted to properly exhaust his administrative remedies by submitting a timely request for Appeals Council review. J.A. 46. And because petitioner is limited by 42 U.S.C. 405(g) to judicial review only of his conformity with the agency's regulatory procedures, judicial review here would not involve a "belated[ ] appeal * * *

of [the] ALJ's decision." Pet. App. 8a (citation omitted). As explained above, if a court were to determine that the Appeals Council erred in finding petitioner's request for review to be untimely, the court would remand to allow further review of the merits by the Appeals Council but would not review the ALJ's decision itself. See pp. 29-30, *supra*.

Judicial review here also does not threaten "the [agency's] orderly procedures for processing disability claims." Pet. App. 8a (citation omitted). Adherence to those procedures is indeed critical for managing the more than two million claims for benefits that SSA receives each year. See SSA, *Annual Performance Report Fiscal Years 2017–2019*, at 33 (Feb. 12, 2018).[16] Of those, thousands are dismissed each year for failure to adhere to a regulatory timing requirement.[17] But because of the limitations the statute places on judicial review, very few claimants who receive a dismissal order will have a plausible basis to ask a court to overturn the agency's decision.

As mentioned above, the Appeals Council's factual finding regarding whether a claimant submitted a timely request for Appeals Council review will be reviewed deferentially—the agency's factual finding must be sustained if supported by "substantial evidence." 42 U.S.C. 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."); see also *Richardson* v.

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[16] https://www.ssa.gov/budget/FY19Files/2019APR.pdf.

[17] This Office has been informed that, in Fiscal Year 2017, the Appeals Council dismissed approximately 2500 requests for review as untimely, and ALJs dismissed approximately 6000 hearing requests as untimely.

*Perales*, 402 U.S. 389, 401 (1971) ("[S]ubstantial evidence" in Section 405(g) refers to "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938)). That standard of review for agency factfinding is even more deferential than the "clearly erroneous" standard that applies to review of a trial court's "findings of fact." *Dickinson* v. *Zurko*, 527 U.S. 150, 152-153 (1999); see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483-484 (1992) ("[T]o obtain judicial reversal of the [agency's] determination, [the plaintiff] must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite [fact]."). And where the agency's determination that a claimant did not timely request review is supported by substantial evidence, a court would review the agency's decision not to excuse the untimely filing at most for abuse of discretion. See *City of New York*, 476 U.S. at 483 ("Ordinarily, the Secretary has discretion to decide when to waive the exhaustion requirement."); see also, *e.g.*, *Loyd* v. *Sullivan*, 882 F.2d 218, 219 (7th Cir. 1989) (per curiam) (noting that "the decision to grant an extension rests within the discretion of the Secretary" and reviewing the decision for abuse of discretion).

It should be a rare case in which a claimant can plausibly maintain that SSA's finding of untimeliness is not supported by substantial evidence, or that SSA abused its discretion in refusing to grant a good-cause exception. But if such a case arises—perhaps because of compelling evidence of a timely submission, or a clear misapplication of the regulatory definition of "good cause"

for extending the time to request review—then there is no sound basis for denying judicial review.

In this case, the record gives reasons to doubt that petitioner will ultimately be able to overturn the agency's finding of untimeliness, as discussed by the court of appeals and the district court while considering petitioner's "Due Process" claim. See Pet. App. 25a-26a, 8a-13a. But the courts' treatment of that issue illustrates another problematic consequence of the interpretation of Section 405(g) adopted by the majority of courts of appeals: it causes claimants to recast ordinary disputes over timeliness as "constitutional challenge[s]." *Eldridge*, 424 U.S. at 330; see, *e.g.*, *Dexter* v. *Colvin*, 731 F.3d 977, 980-981 (9th Cir. 2013); *Callender* v. *SSA*, 275 Fed. Appx. 174, 176 (3d Cir. 2008) (per curiam). As the Seventh Circuit recently observed, construing 42 U.S.C. 405(g) in a way that "forces courts to resolve constitutional questions unnecessarily, while bypassing statutes, regulations, and principles of administrative law that might suffice to decide the case, has nothing to recommend it." *Boley*, 761 F.3d at 808. There is no reason for courts to re-conceptualize garden-variety claims alleging administrative error as deprivations of constitutional rights, especially when the Act itself provides a framework for judicial review of adverse decisions that are based on a finding of a procedural failure by the claimant. See 42 U.S.C. 405(g).

Rather than grant a motion to dismiss in this case, the district court should have denied that motion and then undertaken the limited form of judicial review called for by the statutory text.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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## APPENDIX

1. 42 U.S.C. 405 provides in pertinent part:

**Evidence, procedure, and certification for payments**

**(a) Rules and regulations; procedures**

The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

**(b) Administrative determination of entitlement to benefits; findings of fact; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations; subsequent applications**

(1) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving

divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

(2) In any case where—

(A) an individual is a recipient of disability insurance benefits, or of child's, widow's, or widower's insurance benefits based on disability,

(B) the physical or mental impairment on the basis of which such benefits are payable is found to

have ceased, not to have existed, or to no longer be disabling, and

(C) as a consequence of the finding described in subparagraph (B), such individual is determined by the Commissioner of Social Security not to be entitled to such benefits,

any reconsideration of the finding described in subparagraph (B), in connection with a reconsideration by the Commissioner of Social Security (before any hearing under paragraph (1) on the issue of such entitlement) of the Commissioner's determination described in subparagraph (C), shall be made only after opportunity for an evidentiary hearing, with regard to the finding described in subparagraph (B), which is reasonably accessible to such individual. Any reconsideration of a finding described in subparagraph (B) may be made either by the State agency or the Commissioner of Social Security where the finding was originally made by the State agency, and shall be made by the Commissioner of Social Security where the finding was originally made by the Commissioner of Social Security. In the case of a reconsideration by a State agency of a finding described in subparagraph (B) which was originally made by such State agency, the evidentiary hearing shall be held by an adjudicatory unit of the State agency other than the unit that made the finding described in subparagraph (B). In the case of a reconsideration by the Commissioner of Social Security of a finding described in subparagraph (B) which was originally made by the Commissioner of Social Security, the evidentiary hearing shall be held by a person other

than the person or persons who made the finding described in subparagraph (B).

(3)(A) A failure to timely request review of an initial adverse determination with respect to an application for any benefit under this subchapter or an adverse determination on reconsideration of such an initial determination shall not serve as a basis for denial of a subsequent application for any benefit under this subchapter if the applicant demonstrates that the applicant, or any other individual referred to in paragraph (1), failed to so request such a review acting in good faith reliance upon incorrect, incomplete, or misleading information, relating to the consequences of reapplying for benefits in lieu of seeking review of an adverse determination, provided by any officer or employee of the Social Security Administration or any State agency acting under section 421 of this title.

(B) In any notice of an adverse determination with respect to which a review may be requested under paragraph (1), the Commissioner of Social Security shall describe in clear and specific language the effect on possible entitlement to benefits under this subchapter of choosing to reapply in lieu of requesting review of the determination.

* * * * *

**(g) Judicial review**

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mail-

ing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it

may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

**(h) Finality of Commissioner's decision**

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No

action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

* * * * *

2. 42 U.S.C. 1383(c) provides:

**Procedure for payment of benefits**

(c) **Hearing to determine eligibility or amount of benefits; subsequent application; time within which to request hearing; time for determinations of Commissioner pursuant to hearing; judicial review**

(1)(A) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. The Commissioner of Social Security shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disa-

greement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse the Commissioner's findings of fact and such decision. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under the rules of evidence applicable to court procedure. The Commissioner of Social Security shall specifically take into account any physical, mental, educational, or linguistic limitation of such individual (including any lack of facility with the English language) in determining, with respect to the eligibility of such individual for benefits under this subchapter, whether such individual acted in good faith or was at fault, and in determining fraud, deception, or intent.

(B)(i) A failure to timely request review of an initial adverse determination with respect to an application for any payment under this subchapter or an adverse determination on reconsideration of such an initial determination shall not serve as a basis for denial of a subsequent application for any payment under this subchapter if the applicant demonstrates that the applicant, or any other individual referred to in subparagraph (A), failed to so request such a review acting in good

faith reliance upon incorrect, incomplete, or misleading information, relating to the consequences of reapplying for payments in lieu of seeking review of an adverse determination, provided by any officer or employee of the Social Security Administration or any State agency acting under section 421 of this title.

(ii) In any notice of an adverse determination with respect to which a review may be requested under subparagraph (A), the Commissioner of Social Security shall describe in clear and specific language the effect on possible eligibility to receive payments under this subchapter of choosing to reapply in lieu of requesting review of the determination.

(2) Determination on the basis of such hearing, except to the extent that the matter in disagreement involves a disability (within the meaning of section 1382c(a)(3) of this title), shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

(3) The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner's final determinations under section 405 of this title.

3. 20 C.F.R. 416.1400 provides:

**Introduction.**

(a) *Explanation of the administrative review process.* This subpart explains the procedures we follow in determining your rights under title XVI of the Social Security Act. The regulations describe the process of administrative review and explain your right to judicial review after you have taken all the necessary administrative steps. The administrative review process consists of several steps, which usually must be requested within certain time periods and in the following order:

(1) *Initial determination.* This is a determination we make about your eligibility or your continuing eligibility for benefits or about any other matter, as discussed in § 416.1402, that gives you a right to further review.

(2) *Reconsideration.* If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) *Hearing before an administrative law judge.* If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) *Appeals Council review.* If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) *Federal court review.* When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatis-

fied with our final decision, you may request judicial review by filing an action in a Federal district court.

(6) *Expedited appeals process.* At some time after your initial determination has been reviewed, if you have no dispute with our findings of fact and our application and interpretation of the controlling laws, but you believe that a part of the law is unconstitutional, you may use the expedited appeals process. This process permits you to go directly to a Federal district court so that the constitutional issue may be resolved.

(b) *Nature of the administrative review process.* In making a determination or decision in your case, we conduct the administrative review process in an informal, non-adversarial manner. Subject to certain timeframes at the hearing level (see § 416.1435) and the limitations on Appeals Council consideration of additional evidence (see § 416.1470), we will consider at each step of the review process any information you present as well as all the information in our records. You may present the information yourself or have someone represent you, including an attorney. If you are dissatisfied with our decision in the review process, but do not take the next step within the stated time period, you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure to make a timely request for review.

4. 20 C.F.R. 416.1403(a) provides in pertinent part:

**Administrative actions that are not initial determinations.**

(a) Administrative actions that are not initial determinations may be reviewed by us, but they are not subject to the administrative review process provided by this subpart and they are not subject to judicial review. These actions include, but are not limited to, an action about—

* * * * *

(8) Denying your request to extend the time period for requesting review of a determination or a decision;

* * * * *

5. 20 C.F.R. 416.1405 provides:

**Effect of an initial determination.**

An initial determination is binding unless you request a reconsideration within the stated time period, or we revise the initial determination.

6. 20 C.F.R. 416.1409 provides:

**How to request reconsideration.**

(a) We shall reconsider an initial determination if you or any other party to the reconsideration files a written request at one of our offices within 60 days after the date you receive notice of the initial determination (or within the extended time period if we extend the time as provided in paragraph (b) of this section).

(b) *Extension of time to request a reconsideration.* If you want a reconsideration of the initial determination but do not request one in time, you may ask us for more time to request a reconsideration. Your request for an extension of time must be in writing and it must give the reasons why the request for reconsideration was not filed within the stated time period. If you show us that you had good cause for missing the deadline, we will extend the time period. To determine whether good cause exists, we use the standards explained in § 416.1411.

7. 20 C.F.R. 1411 provides:

**Good cause for missing the deadline to request review.**

(a) In determining whether you have shown that you have good cause for missing a deadline to request review we consider—

(1) What circumstances kept you from making the request on time;

(2) Whether our action misled you;

(3) Whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions; and

(4) Whether you had any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.

(b) Examples of circumstances where good cause may exist include, but are not limited to, the following situations:

(1) You were seriously ill and were prevented from contacting us in person, in writing, or through a friend, relative, or other person.

(2) There was a death or serious illness in your immediate family.

(3) Important records were destroyed or damaged by fire or other accidental cause.

(4) You were trying very hard to find necessary information to support your claim but did not find the information within the stated time periods.

(5) You asked us for additional information explaining our action within the time limit, and within 60 days of receiving the explanation you requested reconsideration or a hearing, or within 30 days of receiving the explanation you requested Appeals Council review or filed a civil suit.

(6) We gave you incorrect or incomplete information about when and how to request administrative review or to file a civil suit.

(7) You did not receive notice of the initial determination or decision.

(8) You sent the request to another Government agency in good faith within the time limit and the request did not reach us until after the time period had expired.

(9) Unusual or unavoidable circumstances exist, including the circumstances described in paragraph (a)(4) of this section, which show that you could not have known of the need to file timely, or which prevented you from filing timely.

8. 20 C.F.R. 416.1421 provides:

**Effect of a reconsidered determination.**

The reconsidered determination is binding unless—

(a) You or any other party to the reconsideration requests a hearing before an administrative law judge within the stated time period and a decision is made;

(b) The expedited appeals process is used; or

(c) The reconsidered determination is revised.

9. 20 C.F.R. 416.1433 provides:

**How to request a hearing before an administrative law judge.**

(a) *Written request.* You may request a hearing by filing a written request. You should include in your request—

(1) Your name and social security number;

(2) The name and social security number of your spouse, if any;

(3) The reasons you disagree with the previous determination or decision;

(4) A statement of additional evidence to be submitted and the date you will submit it; and

(5) The name and address of any designated representative.

(b) *When and where to file.* The request must be filed at one of our offices within 60 days after the date you receive notice of the previous determination or decision (or within the extended time period if we extend the time as provided in paragraph (c) of this section).

(c) *Extension of time to request a hearing.* If you have a right to a hearing but do not request one in time, you may ask for more time to make your request. The request for an extension of time must be in writing and it must give the reasons why the request for a hearing was not filed within the stated time period. You may file your request for an extension of time at one of our offices. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411.

10. 20 C.F.R. 416.1455 provides:

**The effect of an administrative law judge's decision.**

The decision of the administrative law judge is binding on all parties to the hearing unless—

(a) You or another party request a review of the decision by the Appeals Council within the stated time period, and the Appeals Council reviews your case;

(b) You or another party requests a review of the decision by the Appeals Council within the stated time period, the Appeals Council denies your request for review, and you seek judicial review of your case by filing an action in a Federal district court;

(c) The decision is revised by an administrative law judge or the Appeals Council under the procedures explained in § 416.1487;

(d) The expedited appeals process is used;

(e) The decision is a recommended decision directed to the Appeals Council; or

(f) In a case remanded by a Federal court, the Appeals Council assumes jurisdiction under the procedures in § 416.1484.

11. 20 C.F.R. 416.1457 provides:

**Dismissal of a request for a hearing before an administrative law judge.**

An administrative law judge may dismiss a request for a hearing under any of the following conditions:

(a) At any time before notice of the hearing decision is mailed, you or the party or parties that requested the hearing ask to withdraw the request. This request may be submitted in writing to the administrative law judge or made orally at the hearing.

(b)(1)(i) Neither you nor the person you designate to act as your representative appears at the time and place set for the hearing and you have been notified before the time set for the hearing that your request

for a hearing may be dismissed without further notice if you did not appear at the time and place of hearing, and good cause has not been found by the administrative law judge for your failure to appear; or

(ii) Neither you nor the person you designate to act as your representative appears at the time and place set for the hearing and within 10 days after the administrative law judge mails you a notice asking why you did not appear, you do not give a good reason for the failure to appear.

(2) In determining good cause or good reason under this paragraph, we will consider any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have.

(c) The administrative law judge decides that there is cause to dismiss a hearing request entirely or to refuse to consider any one or more of the issues because—

(1) The doctrine of *res judicata* applies in that we have made a previous determination or decision under this subpart about your rights on the same facts and on the same issue or issues, and this previous determination or decision has become final by either administrative or judicial action;

(2) The person requesting a hearing has no right to it under § 416.1430;

(3) You did not request a hearing within the stated time period and we have not extended the time for requesting a hearing under § 416.1433(c); or

(4) You die, there are no other parties, and we have no information to show that you may have a survivor who may be paid benefits due to you under § 416.542(b) and who wishes to pursue the request for hearing, or that you authorized interim assistance reimbursement to a State pursuant to section 1631(g) of the Act. The administrative law judge, however, will vacate a dismissal of the hearing request if, within 60 days after the date of the dismissal:

(i) A person claiming to be your survivor, who may be paid benefits due to you under § 416.542(b), submits a written request for a hearing, and shows that a decision on the issues that were to be considered at the hearing may adversely affect him or her; or

(ii) We receive information showing that you authorized interim assistance reimbursement to a State pursuant to section 1631(g) of the Act.

12. 20 C.F.R. 416.1459 provides:

**Effect of dismissal of a request for a hearing before an administrative judge.**

The dismissal of a request for a hearing is binding, unless it is vacated by an administrative law judge or the Appeals Council.

13. 20 C.F.R. 416.1460 provides:

**Vacating a dismissal of a request for a hearing before an administrative law judge.**

(a) Except as provided in paragraph (b) of this section, an administrative law judge or the Appeals Council may vacate a dismissal of a request for a hearing if you request that we vacate the dismissal. If you or another party wish to make this request, you must do so within 60 days of the date you receive notice of the dismissal, and you must state why our dismissal of your request for a hearing was erroneous. The administrative law judge or Appeals Council will inform you in writing of the action taken on your request. The Appeals Council may also vacate a dismissal of a request for a hearing on its own motion. If the Appeals Council decides to vacate a dismissal on its own motion, it will do so within 60 days of the date we mail the notice of dismissal and will inform you in writing that it vacated the dismissal.

(b) If you wish to proceed with a hearing after you received a fully favorable revised determination under the prehearing case review process in § 416.1441, you must follow the procedures in § 416.1441(d) to request that an administrative law judge vacate his or her order dismissing your request for a hearing.

14. 20 C.F.R. 416.1467 provides:

**Appeals Council review—general.**

If you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action. The Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge. The Appeals Council shall notify the parties at their last known address of the action it takes.

15. 20 C.F.R. 416.1468 provides:

**How to request Appeals Council review.**

(a) *Time and place to request Appeals Council review.* You may request Appeals Council review by filing a written request. You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 416.1470. You may file your request at one of our offices within 60 days after the date you receive notice of the hearing decision or dismissal (or within the extended time period if we extend the time as provided in paragraph (b) of this section).

(b) *Extension of time to request review.* You or any party to a hearing decision may ask that the time for filing a request for the review be extended. The request for an extension of time must be in writing. It must be filed with the Appeals Council, and it must give

the reasons why the request for review was not filed within the stated time period. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411.

16. 20 C.F.R. 416.1471 provides:

**Dismissal by Appeals Council.**

The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended. The Appeals Council may also dismiss any proceedings before it if—

(a) You and any other party to the proceedings files a written request for dismissal; or

(b) You die, there are no other parties, and we have no information to show that you may have a survivor who may be paid benefits due to you under § 416.542(b) and who wishes to pursue the request for review, or that you authorized interim assistance reimbursement to a State pursuant to section 1631(g) of the Act. The Appeals Council, however, will vacate a dismissal of the request for review if, within 60 days after the date of the dismissal:

(1) A person claiming to be your survivor, who may be paid benefits due to you under § 416.542(b), submits a written request for review, and shows that a decision on the issues that were to be considered on review may adversely affect him or her; or

(2) We receive information showing that you authorized interim assistance reimbursement to a State pursuant to section 1631(g) of the Act.

17. 20 C.F.R. 416.1472 provides:

**Effect of dismissal of request for Appeals Council review.**

The dismissal of a request for Appeals Council review is binding and not subject to further review.

18. 20 C.F.R. 416.1481 provides:

**Effect of Appeals Council's decision or denial of review.**

The Appeals Council may deny a party's request for review or it may decide to review a case and make a decision. The Appeals Council's decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you or another party file an action in Federal district court, or the decision is revised. You may file an action in a Federal district court within 60 days after the date you receive notice of the Appeals Council's action.

19. 20 C.F.R. 416.1482 provides:

**Extension of time to file action in Federal district court.**

Any party to the Appeals Council's decision or denial of review, or to an expedited appeals process agreement, may request that the time for filing an action in a Federal district court be extended. The request must be in writing and it must give the reasons why the

action was not filed within the stated time period. The request must be filed with the Appeals Council, or if it concerns an expedited appeals process agreement, with one of our offices. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411.